BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WENDY L. THOMPSON	)	
Claimant	)	
VS.	)	
	)	
HALDEX BRAKE PRODUCTS	)	
Respondent	)	Docket No. 265,851
	)	
AND	)	
	)	
ROYAL AND SUNALLIANCE AND	)	
KEMPER INSURANCE COMPANIES	)	
Insurance Carriers	)	

ORDER

Respondent, Royal and SunAlliance Insurance Company (Royal) and claimant each appealed the February 23, 2004 Award and the February 26, 2004 Award Nunc Pro Tunc and the March 3, 2004 Award Nunc Pro Tunc all entered by Administrative Law Judge (ALJ) Jon L. Frobish. The Appeals Board (Board) heard oral argument on June 22, 2004.

APPEARANCES

Kala A. Spigarilla of Pittsburg, Kansas, appeared for claimant. John D. Jurcyk of Kansas City, Kansas, appeared for respondent and Royal, one of respondent's insurance carriers. Michelle D. Haskins of Kansas City, Missouri, appeared for respondent and Kemper Insurance Companies (Kemper).

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award.[1] It is noted that the record also includes the documents entered into evidence by the parties stipulation dated January 8, 2003.

[1] Unless otherwise specified, all references to the Award shall mean the last Award Nunc Pro Tunc entered by ALJ, specifically the Award Nunc Pro Tunc dated March 3, 2004.

ISSUES

The ALJ found claimant suffered "a continuing injury or series of microtraumas rendering the date of accident the last day the [c]laimant worked, January 14, 2002."[2] The ALJ further found that claimant was capable of engaging in substantial and gainful employment post-accident but because she failed to make a good faith effort to find appropriate employment, a wage was imputed to her based upon her post-accident wage earning ability which the ALJ found was minimum wage. Comparing a post-accident wage earning ability of $206 a week to the claimant's preinjury average weekly wage of $432.80 which the ALJ said resulted in a 48 percent wage loss.[3] He then averaged the 48 percent wage loss with the 100 percent task loss to find a 74 percent work disability. An award was entered for a 74 percent permanent partial disability.

Although not a party to the proceedings, Royal appealed the Award and raised the following issues:

1. Whether claimant met with personal injury arising out of and in the course of her employment.

2. Whether claimant gave notice within ten (10) days of January 14, 2002.

3. Whether written claim was made for an accident of January 14, 2002.

4. Whether an Administrative Law Judge has authority to enter an Award for an accident for which no Application for Hearing has been filed.

5. Whether an Administrative Law Judge has the authority to issue an Award against an insurance carrier who is unnamed and who has not been afforded notice of the claim, notice of the accident or notice of any hearing, deposition or proceeding.

6. Whether an Administrative Law Judge has authority to issue an Award for an accident date against an employer for which no Application for Hearing is on file, no notice has been given, no written claim has been made, and for which the employer is unaware that a potential award may be entered.

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[2] Award Nunc Pro Tunc at 3 (March 3, 2004).

[3] Actually, comparing the imputed post-accident wage of $206 per week with the claimant's average weekly wage of $432.80 results in a wage loss of 52 percent, not 48 percent. Accordingly, the claimant's permanent partial disability award (work disability) should have been 76 percent, not 74 percent.

7. Whether Royal & SunAlliance and Haldex have been denied due process because of Awards being entered for a specific accident which was never claimed by the employee prior to the Award being entered.[4]

Claimant also appealed the ALJ's Award alleging that the ALJ erred in finding claimant's date of accident to be January 14, 2002.

Date of accident is important to this case because respondent's workers compensation insurance carrier changed during the period of time that claimant was employed by respondent and during the period that claimant allegedly suffered a series of work-related traumas and injuries by accident. The records maintained by the Kansas Division of Workers Compensation show the insurance carriers for respondent and their respective periods of coverage as follows:

American Motorists Ins. Co.	May 11, 1998 - May 11, 2000
Lumbermen's Mutual Casualty Co.	May 11, 2000 - May 11, 2001
Royal Ins. Co. of America	May 1, 2001 - May 1, 2003
Royal Indemnity Ins. Co.	July 1, 2003 - April 1, 2004
Sentry Ins. Company	April 1, 2004 - present

Kemper states in its brief to the Board that "Kemper's coverage ended effective May 1, 2001. Haldex was subsequently covered by Royal and SunAlliance. The [c]laimant's last day of work for Haldex was January 14, 2002."[5] Apparently, Kemper is a name applied to a group of companies including Lumbermen's Mutual Insurance Company. For purposes of this Order, the Board will use "Kemper" to describe the insurance company that provided respondent's workers compensation insurance coverage for the period beginning May 11, 2000, and ending May 1, 2001.

The term "Royal" shall include Royal Insurance Company of America and Royal Indemnity Insurance Company, also known as Royal and SunAlliance, which provided respondent's workers compensation insurance coverage from May 1, 2001 until April 1, 2004.

Although Kemper argues claimant failed to prove a connection between her work activities and her injuries, "[i]f, however, the Board affirms the ALJ's finding on compensability, then Kemper would respectively argue that the ALJ was correct in his

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[4] [Royal and SunAlliance] Application for Appeals Board Review and Docketing Statement (filed March 5, 2004).

[5] Brief on Behalf of Haldex as Insured by Kemper (filed May 10, 2004).

finding on the legal date of accident, and hence the coverage for said date is post-Kemper."[6]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the stipulation of the parties and having considered the briefs and oral arguments, the Board finds that the ALJ's Award should be modified to find claimant's date of accident was November 21, 2000, and to correct certain computation errors, but the ALJ's Award should otherwise be affirmed.

Royal argues that the ALJ exceeded his jurisdiction by finding a date of accident subsequent to the date alleged by claimant in her pleadings and at the regular hearing.

> In her Application for Hearing, [c]laimant alleged a date of accident "commencing 8-28-98 and continuing until left work on November 21, 2000." At no time after the filing of this Application for Hearing (on or about April 30, 2001) has [c]laimant ever alleged a different or additional accident or alleged a different date of accident. There was no amended application for hearing filed, no additional claim for compensation filed, and no notice given of any alleged different accident or date of accident. In fact, at the [r]egular [h]earing held on October 14, 2003, [c]laimant stipulated to a date of accident of August 28, 1998 through November 21, 2000. This was [c]laimant's position throughout the proceeding, before and after terminal dates. Claimant has even filed an appeal from the administrative law judge's awards contesting the January 14, 2002 date of accident finding contained therein.[7]

Kemper argues that the ALJ's determination of the ending date for the alleged series of accidents is supported by the facts and the law and, therefore, should be affirmed.

> If it is affirmed that the [c]laimant established causation between her complaints and work, then any permanency that has accrued herein would only be as a result of the [c]laimant's working each and every day on an ongoing basis with a worsening experienced by her until she ultimately leaves employment on January 14, 2002. Claimant did not amend her Application for Hearing to include each and every day up until her last date of employment, but her last day worked is truly the correct legal date of accident under the current case law. *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), *Durham v. Cessna Aircraft Company*, 24 Kan. App. 2d 334, 945 P.2d 8 (1997), *Lott-Edwards v. Americold Corp.,* 27 Kan. App. 2d 689, 6 P.3d 947 (2000), and *Kimbrough v. The University of Kansas Medical Center*, 276 Kan. 853, 79 P.3d 1289 (2003). As her last day of

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[6] *Id.* at 4.

[7] Brief of Appellants Haldex Brake Products and Royal & SunAlliance at 2 (filed April 20, 2004).

> employment (date of accident) is after Kemper went off of the risk, liability does not rest with them.[8]

Furthermore, Kemper contends that it was appropriate for the ALJ to conform the date of accident to the evidence and case law despite the fact that claimant alleged a series ending November 21, 2000.

> The ALJ held in conformity with the current case law that the date of accident in this matter is the date the claimant last worked. Date of accident is a legal conclusion in workers' compensation claims. It is found based upon the circumstances and facts surrounding the allegations, and it is within the ALJ's province to set the date [of] accident. It has been held by this Board that the ALJ may and should amend the date of accident chosen by a party where the evidence so dictates. *Davenport v. Hallmark Cards, Inc. and Kansas Fund*, Docket No. 165,642 (1998). Furthermore, there certainly are cases where the matter has been appealed to the Board or even the Court of Appeals and the appellate body has found a different date of accident from that held below at the trial court level.[9]

Claimant argues that the date of accident should be November 21, 2000 because she performed no significant work after that date. But if it is determined that January 14, 2002 is the correct ending date for the series of accidents, claimant contends that respondent remains responsible for the award and, in addition Royal is also liable because notice to the respondent is deemed to be notice to the insurance carrier. Accordingly, Royal had notice of the claim and decided not to participate. Kemper agrees that Royal remains liable for this claim despite any alleged lack of notice or failure to defend the claim.

> In terms of notice of the proceeding, it has been held that the employer and not the carrier must be given proper notice to be heard and appear to defend the claim. The carrier itself has no separate right of due process. *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000). Also, *Landes v. Smith*, 189 Kan. 229, 368 P.2d 302 (1962). The employer in this matter had notice of the regular hearing, and Cathy Lynch of Haldex actually appeared and testified.[10]

Following creation of the bright line rule in the 1994 *Berry*[11] decision, Kansas appellate courts have consistently grappled with determining the date of accident for repetitive use injuries. In *Treaster,*[12] which is one of the most recent decisions on point,

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[8] Brief on Behalf of Haldex as Insured by Kemper at 3 (filed May 10, 2004).

[9] *Id.* at 3.

[10] *Id.* at 3.

[11] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[12] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

the Kansas Supreme Court held the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. Accordingly, *Treaster* focuses upon the offending work activity.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[13]
>
> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[14]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held the appropriate date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

The *Lott-Edwards*[15] decision is also relevant. In *Lott-Edwards*, the Kansas Court of Appeals held the last-day worked rule is applicable if the work performed in an accommodated position continues to aggravate a repetitive use injury. One of the insurance carriers in that proceeding argued the appropriate date of accident should have been in 1994, when the worker left work for carpal tunnel release surgeries, as the employee allegedly returned to work after those surgeries in an accommodated position. The Kansas Court of Appeals disagreed, however, stating the worker had returned to work performing work duties that were substantially similar to those she performed before surgery. The Court explained the worker's injuries were relentless and continuing with no attenuating event, despite the accommodated work. Consequently, the Court reasoned the appropriate date of accident was the worker's last day of working for the employer.

In November of 2000 claimant was taken off work due to her injuries. During this period she was treating with and received restrictions from Dr. Beatty, Dr. Reintjes, and Dr. Fishman. She underwent a period of conservative treatment and trial attempts to return

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[13] *Id.* at Syl. ¶ 3.

[14] *Id.* at Syl. ¶ 4.

[15] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P. 3d 947 (2000).

her to work with restrictions which included working less than a full eight-hour day. She underwent surgery in September 2001 by Dr. Beatty. She was again released to return to work with restrictions on November 5, 2001. Claimant made several attempts at returning to work with respondent within her restrictions but was unsuccessful. Finally, on January 14, 2002, Dr. Beatty took her completely off work with respondent. Considering the *Treaster*, *Lott-Edwards*, and *Berry* decisions, the Board concludes the appropriate date of accident for claimant's repetitive trauma accident injuries is November 21, 2000. Claimant did not perform significant nor substantial work after that date for respondent and it is unlikely that she suffered additional injury. Except for this finding as to date of accident, and correcting the permanent partial disability award computation to account for the payment of temporary partial disability compensation and to correct the ALJ's multiplication error on the wage loss percentage, the Board adopts the findings and conclusions of the ALJ. In addition, the Board finds claimant's impairment of function to be twelve (12) percent.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the that the Award Nunc Pro Tunc entered by Administrative Law Judge Jon L. Frobish dated March 3, 2004, should be and same is hereby, modified as follows:

The claimant is entitled to 47.35 weeks of temporary total disability compensation at the rate of $288.55 per week or $13,662.84 followed by 290.81 weeks of permanent partial disability compensation at the rate of $288.55 per week or $83,913.23 for a 76 percent work disability, making a total award of $97,576.07.[16]

As of October 15, 2004, there would be due and owing to the claimant 47.35 weeks of temporary total disability compensation at the rate of $288.55 per week in the sum of $13,662.84 plus 156.08 weeks of permanent partial disability compensation at the rate of $288.55 per week in the sum of $45,036.88 for a total due and owing of $58,699.72, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $38,876.35 shall be paid at the rate of $288.55 per week for 134.73 weeks or until further order of the Director.[17]

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[16] The proper method to account for the payment of temporary partial disability compensation is to convert the amount of temporary partial paid into a weekly equivalent by dividing the total sum of temporary partial disability benefits paid by the weekly temporary total disability benefit rate. *Brobst v. Brighton Place North and Church Mutual Insurance Company and Kansas Workers Compensation Fund*, Docket No. 152,447; 152,448 & 152,449 [Affirmed by the Kansas Court of Appeals, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997)].

[17] Claimant's permanent partial disability award would be limited to her percentage of functional impairment for the weeks after November 21, 2000 that she worked and earned at least 90 percent of her average weekly wage. But due to the accelerated pay out formula and because the compensation rate does not change, it makes no difference in the calculation of this award or in the amount due. Therefore, this award simply uses the final percentage of work disability to compute the total number of weeks of permanent partial disability compensation.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October 2004.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Kala A. Spigarelli, Attorney for Claimant
Michelle D. Haskins, Attorney for Kemper Ins. Co.
John D. Jurcyk/Douglas M. Greenwald, Royal and SunAlliance Ins. Co.
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director